| **Bright & Prudent Invs. Ltd. v Horowitz** |
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| 2020 NY Slip Op 34292(U) |
| December 24, 2020 |
| Supreme Court, New York County |
| Docket Number: 651291/2020 |
| Judge: O. Peter Sherwood |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM**

**Justice**

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**BRIGHT AND PRUDENT INVESTMENTS LIMITED,**

**Plaintiff,**

**-against-**

**KENNETH HOROWITZ and PING KEI WILSON CHAN,**

**Defendants.**

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**INDEX No.: 651291/2020**

**MOT. DATE: 9/28/2020**

**MOT. SEQ. No.: 001**

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10 were read on this motion to/for SUMMARY JUDGMENT

Plaintiff Bright and Prudent Investments Limited moves for summary judgment pursuant to CPLR 3212 upon breach of a loan agreement and for account stated against defendant Horowitz. For the following reasons, plaintiff's motion is granted.

As plaintiff's Statement of Undisputed Material Facts merely restates the complaint, the following background is taken from the complaint (Doc. No. 1). On December 26, 2017, plaintiff and Bag Studio LLC ("Borrower") entered into a loan agreement (the "Agreement") (Compl. ¶¶ 1, 9). Plaintiff loaned Borrower $250,000, upon Borrower's promise of repayment with interest beginning October 26, 2017 on the unpaid principal at a rate of 8% per annum in monthly installments to October 26, 2020, at which point any unpaid principal and interest would be due in full (Compl. ¶ 10). Borrower further promised to pay a $160 late charge for each installment more than seven days late (*id.* ¶ 11). The Agreement contained an acceleration clause stating, "if any payment obligation under this Agreement is not paid when due, the remaining unpaid principal balance and any accrued interest shall become due immediately at the option of the Lender" (*id.* ¶ 12). Default events in the Agreement included "failure of the Borrower to pay the principal and any accrued interest when due" and, upon a default event's occurrence, the Agreement and any other obligations of the Borrower would become due immediately, without demand or notice (*id.* ¶ 13). The Agreement contained a Guaranty under which defendants

"unconditionally guarantee[d] all the obligations of the Borrower under this Agreement" (*id.* ¶ 14). Defendants also co-signed the Agreement and signed a Notice to Co-Signer which stated that "the creditor can collect this debt from you without first trying to collect from the borrower" (*id.*; Mak Aff., Ex. A [Doc. No. 5]). Borrower has been in default since December 2019 having failed to pay any principal, eleven late fees, or interest for December 2019 or January 2020 (Compl. ¶¶ 15-18; Mak Aff., Exs. B-C). As of February 12, 2020, the total amount owed to plaintiff is $255,093.34, constituting the unpaid capital of $250,000, unpaid late fees of $1,760, and the total unpaid interest of $3,333.34 (*id.* ¶ 19). Following Borrower's repeated late payments, plaintiff accelerated the loan on December 12, 2019 (*id.* ¶ 20). Defendants have both claimed they are unable to pay the amount owed and neither have taken steps to cure the default (*id.* ¶¶ 21-23). Plaintiff has asserted three claims against defendant Horowitz: (i) breach of contract, (ii) unjust enrichment in the alternative to breach of contract, and (iii) account stated. Plaintiff's motion is unopposed.

In support of its first claim, plaintiff argues summary judgment on breach of contract should be granted where the terms of the contract are clear and unambiguous (Pl. Br. at 5 [Doc. No. 4]; *Modell's NY Inc. v Noodle Kidoodle, Inc.*, 242 AD2d 248 [1st Dept 1997]; *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514 [1st Dept 1995]). When seeking summary judgment on a guaranty, plaintiff must establish the existence of the underlying obligation, the guaranty, and the failure to make payment in accordance with their terms; no proof outside of the documents themselves is needed to make a *prima facie* case against a guarantor (Pl. Br. at 5; *Valencia Sportswear, Inc. v D.S.G. Enters., Inc.*, 237 AD2d 171, 171 [1st Dept 1997]; *see N. Fork Bank Corp. v Graphic Forms Assocs., Inc.*, 36 AD3d 676, 676 [2d Dept 2007]). Here, plaintiff argues it has established a prima facie case under breach of contract against defendant Horowitz as it is undisputed that: (i) Borrower owes plaintiff money pursuant to the Loan Agreement (ii) Horowitz guaranteed that debt, (iii) the amount of debt is not in dispute, and (iv) plaintiff has offered proof of a clear, unambiguous Agreement containing a guaranty provision, a Notice to Co-Signer bearing Horowitz's signature, a notice to accelerate the loan, and both defendants' failure to make payment of the outstanding balance (Def. Br. at 6-7; Mak Aff. ¶¶ 3-11; Exs. A-F [Doc. No. 5]).

In support of its account stated claim, plaintiff argues there is no genuine issue regarding the amount owing, nor has Horowitz protested the amount (Def. Br. at 7-8). Further, plaintiff

argues the Agreement clearly sets out the interest payment, late fees, and principal amount (*id.* at 8). Plaintiff argues it provided a calculation of the interest and unpaid principal to Horowitz which was never contested or objected to (*id.* at 8; Mak Aff., ¶¶ 12-13; Ex. C). Consequently, plaintiff argues it is entitled to an account stated. The motion is unopposed.

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

When seeking summary judgment on a guaranty, plaintiff must establish the existence of the underlying obligation, the guaranty, and the failure to make payment in accordance with their terms; no proof outside of the documents themselves is needed to make a *prima facie* case against a guarantor (Pl. Br. at 5; *Valencia Sportswear, Inc. v D.S.G. Enters., Inc.*, 237 AD2d 171, 171 [1st Dept 1997]; *see N. Fork Bank Corp. v Graphic Forms Assocs., Inc.*, 36 AD3d 676, 676 [2d Dept 2007]).

Here, plaintiff is entitled to summary judgment as to its breach of contract claim. Plaintiff has shown the agreement, its performance, the Borrower's breach, and damages. Plaintiff has further shown the existence of the guaranty in the Agreement and both defendants' and Borrower's failure to make payment in accordance with its terms (Mak Aff., Ex. A; Ex. B; Ex. C). Consequently, plaintiff's motion for summary judgment as to breach of contract is granted against defendant Horowitz.

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). The agreement can be express (*Ross v Sherman*, 57 AD3d 758, 759 [2d Dept 2008]), or "may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Am. Express Centurion Bank v Cutler*, 81 AD3d 761, 762 [2d

Dept 2011]). "[R]eceipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor" (*Shea & Gould v Burr*, 194 AD2d 369, 370-71 [1st Dept 1993] [citation and internal quotation marks omitted]). Here, plaintiff is entitled to summary judgment as to its account stated claim.

For the foregoing reasons, plaintiff's motion is granted as against guarantor defendant Kenneth Horowitz. Plaintiff may settle order on ten (10) days notice.

12/24/2020
DATE

O. PETER SHERWOOD, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | |
| | X | GRANTED | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | REFERENCE |